No. 614

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SUPREME COURT OF THE UNITED STATES.

OCTOBER, 1955, TERM.

CLARENCE A. ZACHER,
Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

To the Chief Justice of the United States and the Associate Justices of the United States Supreme Court:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit which affirmed his conviction for violation of § 145 (b) of Title 26, United States Code, with respect to Counts I, II, III, IV and V of the indictment.

(a) THE OPINION BELOW.

The opinion of the Court below has not yet been officially reported. Copies are hercto annexed (See pp. 29 to 45, infra).

(b) STATEMENT OF GROUNDS OF JURISDICTION.

(i) The judgment of the Court of Appeals was rendered and entered on November 4, 1955.

(ii) Timely application for rehearing was made on November 23, 1955, and was denied on December 12, 1955.

(iii) The jurisdiction of this Court is invoked pursuant to 28 U. S. C., § 1254 and 28 U. S. C., Rule 37.

(c) QUESTIONS PRESENTED FOR REVIEW.

1. Can a defendant be required to stand trial and a conviction be sustained where only hearsay evidence was presented to the grand jury which indicted him?

2. While a civil tax examination was in progress, the Government converted it into a criminal investigation by having a special agent from its Intelligence Unit accompany the revenue agent making the civil examination. No warning of any kind was given the taxpayer by either of them. Can evidence obtained after such conversion be used by the Government in a criminal tax trial in spite of the 4th and 5th Amendments?

3. To prove that the taxpayer had not anonymously contributed $21,428.85 over a 4 year period to various charities, the Government paraded numerous Priests and others who testified that their records disclosed large anonymous contributions, and admitted they could not testify whether the taxpayer gave or did not give. The Government at-

tempted further to prove that neither petitioner nor his wife had cash available to make claimed contributions, without assuming cash assets at the beginning of any indictment year; it offered taxpayer's purported uncorroborated admissions of failure to make contributions. Was a prima facie case made, absent affirmative evidence of failure to make claimed contributions?

4. Prior to and after indictment, taxpayer offered the Government books and records of petitioner's mother-in-law as sources of cash available to him and his wife for the claimed charitable contributions. Can a conviction be sustained in view of the Government's admitted disregard of these leads?

5. Can a conviction be sustained after a refusal to permit taxpayer to prove proper rates of depreciation of income producing real property which would result in (a) substantial decreases in his income taxes, (b) proof that the Government's recalculations were substantially incorrect and (c) proof that taxpayer had unintentionally erred in the Government's favor?

6. Can a special agent identify and introduce in evidence analyses of taxpayer's wife's records which had been prepared not by him, but by another revenue agent, under the discretionary hand of such other agent?

(d) STATUTES RELIED ON.

The statute under which petitioner was prosecuted reads as follows:

Section 145 (b), Title 26, United States Code:

> "Any person * * * who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony

and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

(e) STATEMENT OF CASE.

1. Petitioner was indicted for the wilful filing of various false and fraudulent joint individual income tax returns for the years 1948, 1949 and 1950 and individual income tax returns on behalf of defendant and his wife for the year 1947 (R. 2-6). The Government claimed that the income for those years had been understated by $23,118.18 resulting in an understatement of tax of $9,973.89 which understatements were due to wilful overstatements of deductions. Petitioner was convicted on all five counts. He was sentenced to concurrent terms of imprisonment of 18 months and fined $2,000.00 on each count and to pay the costs of the prosecution (R. 482, 483).

Before trial petitioner moved to suppress evidence and to return property, alleging that the evidence had been obtained by the Government in violation of his constitutional rights against unlawful search and seizure and against self-incrimination (R. 6, 7). Petitioner also moved for the production of the grand jury transcript and for a dismissal of the indictment, alleging that the only evidence before the grand jury was hearsay evidence. An affidavit of petitioner's counsel was attached quoting a statement by the United States Attorney that a treasury department agent was the only witness who had appeared before the grand jury during the inquiry resulting in petitioner's indictment. These questions were preserved throughout the trial and were presented to the Court of Appeals.

At the hearing on the preliminary motions petitioner called the former revenue agent who had initiated the investigation. He testified that late in 1951 he was given pe-

titioner's income tax return for 1949 for civil examination (R. 21). He stated that if there is indication of fraud it is sent to the Special Intelligence Unit (R. 21). After his first day's examination of petitioner's records he had a conference with his group chief and it was determined that he should examine other years, which he commenced to do (R. 22). After a conference with the petitioner in the office of the revenue agent's Group Chief the revenue agent submitted a report which resulted in the submission of the case to the Penal or Intelligence Division (R. 23).

The revenue agent further testified that the special agent of the Intelligence Division entered the investigation but the Zachers were not advised that the examination now had as its purpose criminal prosecution (R. 22, 23). At no time while he and the special agent examined the petitioner's records did they say that this involved a criminal examination nor was the petitioner warned that he would not have to produce any records (R. 23). The first and only warning given to petitioner or his wife that they were being examined for the purpose of a criminal prosecution was at the time of making a formal statement (R. 22, 316) and this was only after all the evidence had been obtained by the agents (R. 24).

The special agent of the Intelligence Unit testified that the purpose of his conducting a joint examination with the revenue agents' office would be to determine whether or not fraud had been committed on the Government. It would be to find out if a crime had been committed (R. 25). He testified that he spent some two and three-quarter days at the home of petitioner making copies of their records in January 1952; but that February 14, 1952, was the first time that petitioner was warned of his constitutional rights (R. 25).

The Court below held that the evidence, documents, books and papers turned over to the Government agents were

voluntarily given and held inferentially that there was no need to warn petitioner of his constitutional rights during the course of the criminal investigation. In ruling upon the other motion, the Court held that inasmuch as the testimony of the special agent was admissible at the trial, it presumably was admissible evidence before the grand jury and sufficient to support the finding of the indictment.

2. At the trial the prosecution offered the income tax returns in question, which reflected generally income from dividends in substantial amounts, and income from rental properties. Reported income was never questioned. The prosecution proceeded upon a "reverse net worth" theory; that is, it sought to prove that neither petitioner nor his wife had sufficient cash available with which to make the charitable donations claimed. The prosecution opened by offering testimony of various priests and other representatives of charitable organizations mentioned in the returns, most of whom testified that their records failed to disclose the names of petitioner or his wife, or of any contributions made by them. Many testified they kept no records at all and therefore did not know whether or not petitioner or his wife had contributed. Each representative, without exception, testified that the organization had received large sums of money from anonymous sources and that no conclusion could be reached as to whether or not petitioner or his wife had made the contributions claimed. The amounts received anonymously by these organizations were not only substantial, but generally far greater than identified amounts received from known contributors (R. 116, 127, 132, 133, 143, 149, 150, 154, 156, 165).

The prosecution next offered the testimony of two or three artisans to the effect either that such artisans' records did not disclose invoices for small amounts claimed by petitioner as deductions in the operation of rental property or that the amount claimed by petitioner as to a par-

ticular invoice was greater than the amount of the invoice. None of these discrepancies exceeded $35.00 (R. 73, 107, 109, 174, 175, 179, 311, 312).

Testimony of two real estate agents was offered to prove that petitioner had reported net rentals received by them. From the returns it was adduced that the expense items paid by such agents had again been deducted. The amounts involved were again small and in the aggregate for all years did not exceed several hundred dollars (R. 180-183, 185-188).

The prosecution also introduced schedules, Government's Exhibits 20A, 20B, 20C and 20D (R. 297-303) through a special agent, which represented the conclusions of the special agent as to which checks of petitioner and his wife were used to pay for items subject to Missouri State Sales tax, plus an amount for each year obtained from Government's Exhibits 19A, 19B, 19C, 19D (R. 277-295) representing available cash which the special agent assumed had been used for the purchase of items on which Missouri sales tax had been paid. The sales tax amounts thus reached were compared with the various amounts claimed on the tax returns.

Evidence was offered as to petitioner's purported "admissions" by the Chief of the Audit Division and by the special agent who had conducted the criminal investigation. This was to the effect that petitioner stated that he was able to support the claimed charitable contributions to the extent of only $200.00 in checks for each of the years in question (R. 120-124); that petitioner agreed that if charts prepared by the special agent were correct then petitioner's deductions were incorrect (R. 325); that the figures used as to contributions were estimates representing donations, the majority of which were made in cash (R. 324), and that when he made the returns he had not realized that he could not have possibly contributed the

amounts claimed (R. 326); that at the time of making up the returns he had believed he had given the amounts claimed because he knew he had been very generous and he didn't have the money left (R. 323).

The special agent who conducted the investigation testified that he and a revenue agent had gone to petitioner's home and examined the books and records there. From these books and records various transcripts were made, some by the special agent and some by the revenue agent. In general, the transcripts of the records of petitioner's wife were prepared by the revenue agent (R. 208, 211, 223, 261, 262, 263, 277, 295). The exhibits prepared by the revenue agent consisted of six columns: date of check, check number, amount of check, payee, endorsements and remarks. These exhibits were identified and introduced solely through the special agent and were used by him in reaching his conclusions as to the amount of cash available out of which charitable contributions could have been made and out of which expenditures subject to Missouri sales tax could have been made. He testified that he was not considering any other cash as to his conclusions in connection with the availability of cash (R. 341).

The special agent further testified that Government Exhibit 17B (R. 223-255), the transcript of deposits to the bank account of petitioner's wife, indicated numerous deposits of cash representing gifts from petitioner's mother-in-law in amounts of thousands of dollars (R. 362, 363); that in connection with checking the affairs of the mother-in-law he merely examined the Probate Court records of her estate without attempting to determine what cash she had had and what had happened to it; that he had not interviewed anyone handling property belonging to petitioner's mother-in-law to determine whether or not gifts had been made to petitioner's wife and in what amounts (R. 363).

The prosecution offered the testimony of another revenue agent who had had no investigatory connection with the case. This testimony was offered purely to demonstrate the amounts of tax owed, based on the Government's evidence. He testified that he had been guided by the prosecutor's office in what items were included in his computations and that if the transcript figures were incorrect then his conclusions were incorrect (R. 372-382).

3. The petitioner offered evidence tending to prove that a casualty loss claimed for the year 1949 (the tax return used the phrase "Paid to Kuhs Buick") had actually been incurred (R. 391-394, 443-445). Testimony was also offered as to the proper life of various rental properties owned by petitioner and his wife during the years in question to show that sufficient depreciation deductions were not taken, to which evidence the prosecution objected and which objection was sustained (R. 394-405). Petitioner also offered evidence tending to prove that the amounts contributed to at least one of the charities listed by petitioner during all of the years in question, Webster College, was far in excess of the total amount allowed by the prosecution in its computation (R. 406-441). Petitioner's brother-in-law testified that he managed several rental properties of Mrs. Zacher; that frequently repairs and other expenditures were ordered in his name and paid for by him and that adjustments were made from time to time by the petitioner and himself which did not show in the statements. An offer of proof was made through this witness that since 1933 he had managed the real property belonging to petitioner's mother-in-law and had taken care of her other affairs; that she accumulated vast sums of cash at her home, distributing large sums at irregular intervals over the years; that when she died, despite a large net income over the years, she left no cash available and had not used the same for investments and that the cash

had been distributed to her children and mainly to petitioner's wife (R. 421-429).

Lastly, testimony of a certified public accountant was offered to the effect that Missouri State income tax instructions suggested a flat deduction of 1% of net income for Missouri State sales tax; that a custom and practice has arisen among taxpayers in Missouri to take a flat arbitrary deduction of 1% of adjusted gross income as a sales tax deduction (R. 431-434). He further testified that a depreciation rate of 2% is properly used only as to new buildings, and 10% is ordinarily used for tenement property (R. 437).

(f) JURISDICTION OF THE COURT BELOW.

The District Court had jurisdiction under 26 U. S. C., § 145 (b). The Court of Appeals had jurisdiction under 28 U. S. C., § 1291.

(g) REASONS RELIED ON.

As to Question 1:

The Court below, while endeavoring to avoid making the same bold assertion made by the majority of the Court of Appeals for the Second Circuit in Costello v. United States (April 5, 1955), 221 F. 2d 668, to the effect that a valid indictment could be returned by a federal grand jury predicated solely on hearsay evidence, has nevertheless reached that conclusion. This question has not yet been decided by this Court, and certiorari was granted in Costello v. United States by this Court, limited to this question, on October 10, 1955.

After the return of the indictment, and prior to the trial, petitioner moved for the production of the grand jury

transcript and for dismissal of the indictment, alleging that the only evidence before the grand jury was hearsay evidence. Attached to the motion was an affidavit of petitioner's counsel, quoting a statement by the United States Attorney to the effect that a Treasury Department Agent was the only witness who had appeared before the grand jury during the inquiry resulting in petitioner's indictment. This affidavit was filed in conformity with the requirements of the Tenth Circuit in Cox v. Vaught (1931), 52 F. 2d 562. Without having the grand jury transcript, the production of which the District Court refused to permit, petitioner's counsel could not do more.

The Court of Appeals, in its opinion, meets this problem with the statement:

> " . . . Even if it be true that Agent Hanley was the only witness before the grand jury, the same witness appeared at the trial and offered substantial evidence which was admitted. Presumably he covered the same field before the grand jury . . . "

This statement ignores the fact that other witnesses and documents were offered at the trial prior to the testimony of the Treasury Department Special Agent who had previously testified before the grand jury. These other witnesses and other documents established a sufficient foundation for the testimony of this special agent at the trial and for the introduction of the schedules, computations and admissions, if any, made by and introduced through such agent at the trial. This could not have been true as to the grand jury since the special agent was the only one to testify there.

There is a conflict in the decisions of the Court of Appeals for the Eighth Circuit and the recent decisions in Costello v. United States by the Second Circuit. In Nanfito v. United States, 8 Cir. (1927), 20 F. 2d 376, and Brady

v. United States, 8 Cir. (1928), 24 F. 2d 405, and the Court concluded that if no evidence whatever or no competent evidence of offenses charged had been presented to the grand jury, the indictment which had been returned should be quashed. Banks v. United States, 8 Cir. (1953), 204 F. 2d 666, certiorari denied 346 U. S. 757; order vacated 347 U. S. 1007; judgment vacated and case remanded 348 U. S. 905, 223 F. 2d 884, now on application for certiorari (No. 337), is not in conflict with the Nanfito and Brady cases, inasmuch as in the Banks case the Court of Appeals held that the evidence before the grand jury was not incompetent.

In view of the fact that this Court has granted certiorari as to this question in United States v. Costello, the determination of the Court below should be reviewed by this Court.

As to Question 2:

The opinion of the Court below as to the use of evidence obtained by the prosecution during the course of what purported to be a civil examination, but which was in reality a criminal investigation, is in conflict with the opinions of this Court, denying the use of evidence obtained under similar circumstances in revenue cases.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrant shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the Constitution of the United States provides in part that:

"No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

Here petitioner was deliberately misled and deceived into believing that a civil investigation only was taking place. Sometime late in 1951, and prior to the time the special agent entered the case, a revenue agent had been given petitioner's income tax return for 1949 for civil examination. Petitioner had kept records for tax purposes as required by 26 U. S. C., § 6001, and produced them in accordance with the requirements of 26 U. S. C. § 7602. So long as this remained a civil examination petitioner could not have invoked the protection of the Fourth or Fifth Amendments. **Den v. The Hoboken Land and Improvement Co.** (1855), 18 How. (59 U. S.) 272, 59 L. Ed. 373; **In re Meador** (1869), 16 Fed. Cases No. 9375 (p. 1293); **In re Strouse** (1871), 23 Fed. Cases No. 13,548 (p. 261).

The revenue agent testified that if he finds indication of fraud his findings are referred to the special intelligence unit (R. 21); that after his first day's examination of petitioner's records he had a conference with his group chief and it was then determined that he would examine other years, which he commenced to do (R. 22). The case was submitted to the Penal, or Intelligence, Division (R. 23).

At no time up to this point had any warning been given petitioner. At the time the special agent entered the investigation and went to petitioner's home, petitioner was not advised that the purpose of the investigation was changed and he was under no obligation to submit to any further examination (R. 22, 23).

The Court below permitted the introduction of all evidence obtained by the Government after the investigation had become a criminal one, stating that petitioner's actions were voluntary and thus holding inferentially that there

was no requirement that petitioner be warned or advised of his constitutional rights after the change in purpose.

There is an intimate relationship between the Fourth and Fifth Amendments, **Boyd v. United States** (1885), 116 U. S. 616, 29 L. ed. 746, 6 S. Ct. 524; historically there has been no question but that the prohibitions of the Fourth and Fifth Amendments prevented the duping of a citizen by causing him to believe that information he was "voluntarily" giving for civil purposes was at the time given intended to be used for criminal purposes. Similarly, these amendments prohibited the use of evidence found during searches and seizures "voluntarily" given in submission to governmental authority without an understanding of the nature of the search and the rights of the individual submitting thereto. **Johnson v. United States** (1948), 333 U. S. 10, 13, 92 L. ed. 436, 68 S. Ct. 367. This Court there held:

> "Entry to defendant's living quarters, which was the beginning of the search, was demanded under color of office. It was granted in submission to authority rather than as an understanding and intentional waiver of a constitutional right . . ."

In the instant case, the Court below held:

> ". . . The record clearly shows that the furnishing of all information and records by the defendant to the agents was entirely voluntary. There is no evidence that the agents used any force or pressure at any time . . ."

Implicit in the foregoing is that petitioner understood two things. First, that a criminal investigation was taking place and second, that under the Constitution he could have then denied access to the evidence later used against him at the trial. It is clear from the evidence that the agents not only failed to carry out a duty to advise

petitioner, but also affirmatively misled him into believing that the nature of the investigation still remained civil. Under these circumstances could petitioner have impliedly waived such fundamental constitutional rights?

In parallel situations in other fields it is clear that as to such specific constitutional rights courts never find implied waiver. These rights are jealously guarded and should never be lost by implication. Waiver should be predicated solely upon an intentional and deliberate choice between invoking or discarding a legal right of which a defendant has full knowledge. In **Johnson v. Zerbst** (1938), 304 U. S. 458, 464, 82 L. ed. 1461, 58 S. Ct. 1019, a case involving conviction for forgery, this Court held with reference to a purported implied waiver of the right to counsel:

> "There is insistence here that petitioner waived this constitutional right. The District Court did not so find. It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and we 'do not presume acquiescence in the loss of fundamental rights'. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. . . ."

Without full knowledge, which was not present here, there can be no waiver. So also, in Amos v. United States, 255 U. S. 313, 317, 65 L. ed. 654, 41 S. Ct. 266, this court held:

> "The contention that the constitutional rights of defendant were waived when his wife admitted to his home the Government officers, who came, without warrant, demanding admission to make search of it under Government authority, cannot be entertained. We need not consider whether it is possible for the wife, in the absence of her husband, thus to waive his constitutional rights, for it is perfectly clear, that under the implied coercion here presented, no such waiver was intended or effected."

Petitioner was deliberately misled and deceived into believing that a civil investigation only was taking place. The special agent admitted that the purpose of his examination was to determine whether or not a crime had been committed (R. 25). He testified that he examined records at some length prior to advising petitioner as to his constitutional rights (R. 25, R. 314, 338-341). Prior to the time the special agent entered the case the revenue agent had begun and continued a civil examination. At the time the special agent entered the picture the criminal investigation was underway and petitioner should have been warned that the character of the examination had completely changed. No such warning was given. This is not a case of the voluntary surrender by the petitioner of the data here involved, due to the fact that petitioner was unaware of the criminal nature of the investigation.

This Court has never passed on this specific question. In other fields this Court has not permitted the whittling away of rights and privileges of such moment. In view of the fact that there are conflicting attitudes among various Federal Courts in comparable situations in parallel fields of tax laws, the decision of the Court below should be reviewed by this Court.

As to Question 3:

The Court below reached an affirmative conclusion that the petitioner had not made the contributions claimed to have been made during the indictment years on the strength of negative testimony entirely. The negative evidence was as follows:

(A) A parade of a great number of Roman Catholic priests and officers of other charitable organizations, who testified to the effect that the records of the organizations with which they were connected did not disclose the names of petitioner or his wife, or contributions made by either.

Some said that their organizations had no records of contributions. All said that their organizations had received large sums as anonymous contributions. These anonymous contributions were always as great or greater than identified contributions. In all instances the anonymous contributions greatly exceeded the amounts claimed as deductions (R. 116, 127, 132, 133, 143, 149, 150, 154, 156, 165). Not one testified that neither petitioner nor his wife had made the contributions claimed. As to some of the organizations to which petitioner claimed to have contributed, the prosecution offered no evidence at all.

If petitioner had called these same witnesses and elicited the same testimony, would this have been received as affirmative evidence that petitioner's claimed contributions were in fact a part of the anonymous contributions? It is submitted that such evidence is neither for nor against petitioner.

(B) The prosecution, through audits and transcripts prepared by the revenue agent and the special agent purported to reconstruct the financial activities of petitioner and his wife for each of the indictment years. These documents, introduced through the special agent, were Government's Exhibits 17 through 20, inclusive. The purpose of these exhibits was to support the prosecution's contention that it would affirmatively prove that neither petitioner nor his wife had sufficient cash available during the indictment years to make the claimed contributions. In other words, this was an attempt to create a "reverse net-worth" case.

In none of these exhibits does the prosecution admit or assume cash assets at the beginning of the indictment years, or further, at the beginning of any particular indictment year. In other words, a zero starting cash position was assumed for each of the years.

In addition, the transcripts prepared as Government's Exhibits 20A, B, C and D, purportedly to determine cash available with which to make purchases subject to Missouri sales tax, disclosed cash available during 1947 in the amount of $2,251.92; 1948, $2,410.70; 1949, $1,993.73; 1950, $2,091.58 (R. 295-303). None of this available cash was taken into account as having been available to make contributions. Apparently there was an assumption by the prosecution that these funds were used for living expenses —but no proof of any living expenses was offered. The Court below failed to heed the admonition of this Court in **Holland v. United States** (1955), 348 U. S. 121, 132, 99 L. ed. 150, 75 S. Ct. 127:

> "We agree with petitioners that an essential condition in cases of this type is the establishment, with reasonable certainty, of an opening net-worth, to serve as a starting point from which to calculate future increases in taxpayer's assets . . ."

Despite the assertion of the Court below to the contrary, for purposes of this type of proof, this case is a net-worth case in reverse.

(C) The prosecution made two efforts to prove that petitioner had admitted that he had not made the contributions claimed. The first consisted of the testimony of the Chief of the Audit Division in the Office of the District Director in St. Louis as to a conversation he had had with petitioner on December 31, 1951. The upshot of this testimony on redirect examination was as follows:

> " 'Q. (By Mr. Rehm) You said this $200.00 figure was arrived at on the basis of lack of checks to substantiate it, is that your testimony on cross-examination?
>
> " 'A. That was as I understood it . . .
>
> " 'Q. (By Mr. Rehm) I will ask you, sir, if you

recall any other conversation other than the lack of checks to substantiate it, sir?

" 'The Court: He may answer.

" 'A. I recall no other conversation' (R. 123-124)."

In addition, a question and answer statement given by the petitioner voluntarily and under oath, was introduced through the special agent. Reading the question and answer statement as a whole, it is clear first that petitioner is agreeing that if "some schedules" which are never identified or introduced in evidence, are correct, then the amounts claimed as contributions are incorrect and, second, that petitioner believed that he had made the contributions claimed at the time of making and filing the tax returns in question. These written "admissions" amount to no more than the verbal "admissions." In the first instance the "admissions" were predicated upon lack of checks to substantiate the claimed deductions and in the second upon some schedules which the government saw fit not to introduce at the trial. These are the statements of a man that he cannot, for civil tax purposes, substantiate his claimed contributions.

But, even assuming that these are admissions, they were inadmissible because there was no corroboration by substantial independent evidence tending to establish the trustworthiness thereof. Since the decision of this Court in **Opper v. United States** (1955), 348 U. S. 84, 99 L. ed. 101, 75 S. Ct. 158, and **Smith v. United States** (1955), 348 U. S. 147, 99 L. ed. 192, 75 S. Ct. 194, it is settled that the essential elements tending to be proved by such admissions must be corroborated by substantial independent evidence.

The prosecution was endeavoring to prove a willful substantial understatement of tax. Absent proof that the claimed contributions had not been made, there was no substantial understatement of tax.

The Court below determined that petitioner's admissions were corroborated, relying heavily upon the evidence of the priests and other officers of charitable organizations. Included in its discussions of corroboration was the following:

> " . . . Except for the $149.50 in cancelled checks, no substantial proof was offered to support defendant's contention that the contributions had been made. Defendant produced no records to substantiate the contributions. The compiled financial records of defendant and his wife showed that the defendant did not have money available in the form of currency to make the substantial contributions claimed . . . "

The Court below does not explain how it is possible that failure to present proof by petitioner is affirmative evidence of substantial independent evidence corroborating petitioner's "admissions."

Following this, the Court below states that there is direct proof exclusive of any admissions from which the jury could find that petitioner overstated casualty losses and sales tax. But, such proof would not be substantial independent evidence tending to establish the trustworthiness of the "admissions" concerning the charitable contributions and further the prosecution's failure to establish a starting point invalidates its conclusions as to sales tax, just as it does with reference to claimed contributions.

In addition, the Court below apparently overlooks the fact that petitioner's books and records, from which the "reverse net-worth" and sales tax schedules were derived, are also "admissions," so that the prosecution would be endeavoring to support one admission by offering another.

The Court below attempts to meet these failures by saying:

> " . . . A consistent pattern of overstating deductions is shown . . . "

But, even assuming that the conclusion of the court is correct and that the prosecution proved the willful raising of a few minor page two expenses and three small casualty losses, would this prove that large charitable contributions had not been made? The Government must stand or fall on proof of failure to make the charitable contributions claimed and the willful deduction thereof. There is no relationship in fact or logic between the minor items of rental property expenditures and casualty losses and the charitable contributions claimed. The language in **Hartman v. United States** (8 Cir., 1954), 215 F. 2d 386, makes such a distinction:

> ". . . Although it has been argued here that the extraneous matter was admissible to establish intent, the record does not support that justification of the admissions in evidence. In order for wrongful acts not included in the charge to be admissible to prove intent, they must be of such a character that as a matter of logic they tend to demonstrate a criminal intent in the acts within the charge. **Wolcher v. United States**, 9 Cir., 200 F. 2d 493."

There is lacking in this case any of the indicia of fraud or wrongful intent described as a necessary requisite for tax fraud conviction in **Spies v. United States** (1943), 317 U. S. 492, 499, 87 L. ed. 418, 63 S. Ct. 364.

Since the Court below affirmed the action of the trial court on the theory that the prosecution had made a submissible case which was not in fact made, we call the Court's attention to **Ward v. United States** (1953), 344 U. S. 924, 97 L. ed. 711, 73 S. Ct. 494, wherein this Court reversed an affirmance resting on the same ground.

As to Question 4:

Prior to the time of the filing of the complaint, and prior to the return of the indictment by the grand jury, petitioner, through his attorneys, attempted to have the prosecution investigate sources of funds out of which the claimed contributions could have been made. One of the attorneys for petitioner wrote a letter to the District Attorney in which pertinent information as to sources of funds was set forth, together with a request to the District Attorney that he ask the Department of Justice to reopen the case to investigate such sources (Def. Ex. A2, A3, A4, A5, R. 36-40). No action was taken by the Department of Justice. The subpoena duces tecum which was issued requesting the District Attorney to bring the various letters before the Court was quashed on the motion of the prosecution (R. 19, 20).

In **Holland v. United States**, 348 U. S. 121, 99 L. ed. 150, 75 S. Ct. 127, this Court analyzed the duty of the prosecution to investigate such leads offered by taxpayers.

All of the evidence of the prosecution, and particularly the testimony of the special agent, demonstrated the cooperativeness of petitioner and his efforts to assist the Government in determining the correct amounts of his tax liabilities. This cooperation was continued after petitioner employed counsel.

Petitioner's mother-in-law died in 1948 (R. 417). Since the death of her husband, in 1933, her declared intention had been to distribute her funds to her children and not to accumulate them (R. 412-421). Nothing comparable to the situation in the Holland case justified the refusal of the Government to investigate the financial activities of the mother-in-law both prior to and during the taxable years, especially in view of the letter from petitioner's counsel to the District Attorney. In this case not only was the

lead itself disregarded by the prosecution, but every effort to introduce the evidence was thwarted by numerous and continuous objections successfully urged.

Here the petitioner was thrust into the very "dilemma, especially serious in this type of case, of accused's being forced . . . to come forward to substantiate leads which he had previously furnished the Government." **Holland v. United States**, supra. Petitioner's own efforts to introduce the evidence were thereafter successfully blocked by the Government (R. 412, 416-421, 430).

As to Question 5:

The Court below upheld the District Court in denying petitioner's offered evidence as to improper rates of depreciation, stating that the only evidence offered was evidence as to the time each of the properties was constructed, and the remaining useful life of these properties from and after 1947.

In addition to this evidence petitioner also offered evidence through the witness Wander as to the date of acquisition by petitioner, or his wife, of the majority of the properties involved (R. 420). The Court then states that the objection made to the proffered evidence was properly sustained "as the date of acquisition by the taxpayer is the proper starting point for depreciation."

It is true that as to the depreciable property depreciation should be commenced as of the date of acquisition, but the rate of depreciation is not governed for succeeding years by the rate chosen for the first year. **Collins v. Commissioner** (1952), 18 T. C. 99, affirmed (6th Cir., 1953), 203 F. 2d 565. In fact, a separate and independent determination must be made at the end of each particular year in which depreciation is taken as to the rate of depreciation for that particular year, upon the facts known

at the end of such particular year. **Cleveland Adolf Meyer Realty Corporation v. Commissioner** (1947), 8 T. C. 1163; **Commissioner v. Mutual Fertilizer Co.** (5 Cir., 1947), 159 F. 2d 470; **Virginia Hotel Corp. v. Helvering** (1943), 319 U. S. 523, 87 L. Ed. 1561, 63 S. Ct. 1260, rehearing denied, 320 U. S. 810, 88 L. ed. 849, 64 S. Ct. 27.

In addition to the above evidence offered by petitioner, evidence as to cost, date of acquisition, depreciation rate claimed and amounts of depreciation previously allowed was before the District Court in the form of schedules forming a part of petitioner's tax returns, and the return of his wife for the year 1947—all of which were put in evidence by the Government. The correctness of these returns in this regard was not challenged by the Government. Logically, therefore, all of the evidence was before the Court, except evidence as to the useful life of the property as of the beginning of the first indictment year. Since the determination as to the rate of depreciation had to be made for each year in question, this evidence was essential to prove that petitioner had understated an allowable deduction.

The evidence offered should have been received both to demonstrate that the errors which taxpayer had made (as to minor page two deductions and casualty losses) were not wilful, but were simply mistakes of fact and as evidence demonstrated the erroneous recalculation of petitioner's taxes by the prosecution's witness as was said in **Clark v. United States** (8 Cir., 1954), 211 F. 2d 100, cert. den. 348 U. S. 911, 99 L. ed. 714, 75 S. Ct. 289:

> ". . .If the taxpayer legally has other deductions than those he had so claimed, it is his privilege to show them and explain them as part of his defense . . ."

As to Question 6:

During the trial the Government offered, through a special agent, the various exhibits which purported to be transcripts of petitioner's wife's records, Government's Exhibits 17B, 19A, B, C and D. The special agent testified that these exhibits were prepared wholly by the revenue agent (who was available to the Government but was not called) (R. 358, 359). The special agent also testified that portions of Government's Exhibits 19A, B, C and D had been prepared by the revenue agent.

These exhibits formed the foundation for the prosecution's analysis of the financial activities of petitioner and his wife during the indictment years (R. 262, 263, 297).

Over petitioner's objections the prosecution persuaded the trial court that the exhibits prepared by the revenue agent could be introduced through the special agent under the federal shop-book rule as set forth in 28 U. S. C., §§ 1732 and 1733. Inasmuch as these exhibits had been prepared solely for trial purposes they were not admissible under either of these sections. **Palmer v. Hoffman** (1943), 318 U. S. 109, 87 L. ed. 645, 63 S. Ct. 477.

The Court below, under Point VII, concludes that factually the present case is more like **United States v. Mortimer** (2 Cir., 1941), 118 F. 2d 266, than it is like **Hartzog v. United States** (4 Cir., 1954), 217 F. 2d 706, stating that:

> ". . . Here the agent who prepared the transcript merely copied and listed the various items of receipts and disbursements. He listed all such items shown by Mrs. Zacher's records. No classification of the various items as to whether they were capital or income was involved. His duty was merely to copy all items as they appeared on the record . . ."

An examination of the special agent's testimony in this regard demonstrates the error in this conclusion. The

special agent testified that he instructed the revenue agent as to the form that he wished the transcripts to be prepared, that is, which column should contain the date of the check, which column the check number, which column the amount, which column the payee, which column the endorsement, which column the bank through which it was negotiated and the column in which the remarks were to be placed (R. 275). He further testified on cross-examination:

> "The rest of it is in Mr. McGarry's (the revenue agent) handwriting. All the actual organization of material that went in there was prepared by Mr. McGarry. All the rest of it is his . . ."
>
> ". . . In connection with Government's Exhibit 19-D I prepared the headings that Mr. McGarry followed but the balance of the entries of Mrs. Zacher's cancelled checks were prepared by Mr. McGarry and all of the entries of Mr. Zacher's cancelled checks were prepared by me . . ."
>
> ". . . I sat and did one page of work and he sat and did the other . . ." (R. 358, 359).

There is no testimony of the special agent that he ever examined any of the information and materials used by revenue agent McGarry in preparing his worksheet; in fact, a reading of his testimony leaves no doubt that he never did examine any of it (R. 275, 358, 359). Under both the Mortimer and the Hartzog cases, supra, the offering party (here the government) must demonstrate that the evidence offered was compiled

> ". . . according to a method at once practicable and offering reasonable guaranty of accuracy . . ."

In neither case does the fact that the petitioner could demonstrate the error or fallibility that might lie in the evidence offered alter the requirements of the test. The Court below also comments:

". . . Further, it appears that Mrs. Zacher's bank records were still readily available to the defendant and could easily have been produced if desired to demonstrate any error that might have been made in listing such items . . ."

This is true in any comparable case and was certainly true in the Hartzog case, supra, but it is unusual to require a defendant to prove his innocence.

An examination of the exhibits which had been prepared by the revenue agent demonstrates that he had great discretion, if as to nothing else, as to what would be included in "Remarks." See Government's Exhibit 19-D (R. 277-293), for example. There is no proof that the "Remarks" column consisted of anything more than the independent conclusions of the revenue agent—something which was certainly not the mere copying of records as was the situation in the Mortimer case, supra, but a field in which, in the language of the court in the Hartzog case, supra,

". . . He exercised his own discretion and judgment as to classification of information which he alone saw . . ."

The Court below has thus rendered a decision on an important question of federal law which is in direct conflict with a decision of the Fourth Circuit in the Hartzog case, which conflict should be settled by this Court.

CONCLUSION.

It is respectfully submitted that each of the questions raised is of such importance in the administration of criminal law, and especially of the administration of criminal law as it relates to income tax evasions, that there should be an interruption and determination thereof by this

Court. Accordingly, petitioner asks that this Court issue a writ to review the judgment of affirmance herein.

Respectfully submitted,

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APPENDIX.

Opinion.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit.

No. 15,310.

Clarence A. Zacher, Appellant, vs. United States of America, Appellee.		Appeal from the United States District Court for the Eastern District of Missouri.

[November 4, 1955.]

Milton Yawitz (William J. Costello, Robert H. Batts, and Rassieur, Long & Yawitz were with him on the brief), for appellant.

Robert C. Tucker and Charles H. Rehm, Assistant United States Attorneys (Harry Richards, United States Attorney, was with them on the brief), for appellee.

Before Sanborn, Collet, and Van Oosterhout, Circuit Judges.

Van Oosterhout, Circuit Judge.

The appellant, Clarence A. Zacher, hereinafter referred to as defendant, was found guilty by a jury on all counts

of a five-count indictment, each count charging violation of 26 U. S. C., § 145 (b) by the filing of a fraudulent income tax return. The first count is based on defendant's 1947 return, the second on the 1947 return of defendant's wife prepared and filed by defendant, and the third, fourth, and fifth counts are based on joint returns of defendant and his wife for the years 1948, 1949, and 1950, respectively. The defendant appeals from final judgment and sentence upon each of said counts. Jurisdiction of this court is invoked under 28 U. S. C., § 1291.

The Government makes no attack upon the gross income reported. Its case is based on unauthorized deductions. The Amended Bill of Particulars filed by the Government reads as follows:

"1. As to each of the five counts of the indictment it is charged that the defendant filed a false and fraudulent income tax return in that he overstated his deductions. The overstatements of his deductions are as follows:

Count I	$3,608.21
Count II	1,549.49
Count III	5,345.25
Count IV	5,944.21
Count V	6,953.71

"2. The method used by plaintiff in arriving at defendant's correct income is as follows: The gross receipts figures as shown in the returns are adopted as true. Certain specific items of deductions are disallowed and the true net income is determined in subtracting from the reported gross the deductions which are allowed. Plaintiff's proof will further consist of a showing that certain deductions as claimed on Page 3 of the returns were not, in fact, made and could not have been made because of the lack of cash available and proof that the claimed deductions were not paid or made by check."

Proof was offered of overstatement of deductions relating to contributions, casualty losses, taxes, and repairs to rental property. The facts will be further developed hereinafter.

Defendant asserts twelve errors upon which he relies for reversal. These claimed errors are consolidated and summarized as follows:

1. The Government failed to make a prima facie case.

2. The indictment was barred by the statute of limitations.

3. The indictment was not based on competent evidence.

4. Evidence was obtained from defendant in violation of his constitutional rights.

5. There was a fatal variance between the bill of particulars and the Government's proof.

6. The evidence as to leads furnished was improperly excluded, and the Government failed to follow leads.

7. Prejudicial error was committed in the reception and exclusion of evidence.

8. The court erred in refusing certain requested instructions.

We will proceed with the consideration of the defendant's contentions.

1. The defendant moved for a judgment of acquittal at the close of the Government's evidence and at the close of all of the evidence, and said motion was again urged in motion for judgment notwithstanding the verdict. Since evidence was offered in defendant's behalf, the motion interposed at the close of the Government's case has been waived. **United States v. Calderon**, 348 U. S. 160, 164; **Hoyer v. United States**, 8 Cir., ... F. 2d ..., decided June 21, 1955. The other motions are before us for consideration.

In determining the sufficiency of the evidence to support the verdict of the jury, we must view the evidence in the light most favorable to the Government, and give the Government the benefit of all inferences that may reasonably be drawn from the evidence. **Hoyer v. United States,** supra. The principal overstatement of deductions is in connection with contributions. During the four years here involved defendant and his wife claimed contributions totalling $21,428.85 and had cancelled checks to support only $149.50 of said contributions. In the 1950 joint return contributions were claimed as follows:

St. John's Catholic Church, St. Louis, Mo.	$ 791.60
Church of the Immaculate Conception, St. Louis, Mo.	725.00
St. Peter and Paul's Church, St. Louis, Mo.	697.00
St. Alphonsus Church, St. Louis, Mo.	672.50
St. Pius Church, St. Louis, Mo.	627.00
Webster College, Webster Groves, Mo.	570.00
St. Margaret's Church, St. Louis, Mo.	570.00
St. Francis Xavier's Church, St. Louis, Mo.	547.25
Chaminade College, Clayton, Mo.	510.50
Father Dempsey's Charities, St. Louis, Mo.	200.00
St. Vincent de Paul's Society, St. Louis, Mo. ..	57.00
Mary Queen of Peace Church, Glendale, Mo. ..	175.00
Benedictine Mission Home, Schuyler, Nebr.	162.50
Cardinal Glennon Memorial Hospital Fund, St. Louis, Mo.	25.00
St. Augustine Monastery, Pittsburgh, Pa.	75.00
Salvation Army, St. Louis, Mo.	26.00
Miscellaneous Donations to Missions, Community Chest, Red Cross, etc.	57.40
	$6,488.75

While amounts claimed for contributions varied, the foregoing is typical of charitable contributions claimed in all involved returns. The Government agents spent consider-

able time examining the defendant's records. Agent Burton testified that, while he was investigating defendant's returns, defendant admitted that he had nothing to support his contributions claims and conceded that $200 a year, which another revenue agent estimated to be the proper annual amount of contributions, was about the right amount. Later, when defendant was questioned by the examiner under oath, defendant reaffirmed the previous information given to the revenue agents that all income, loans, dividends, gifts, inheritances, and other cash received were uniformly deposited in his own or his wife's bank account, except for certain designated rent checks which were cashed. The agents prepared a schedule showing cash available from checks drawn to cash and the undeposited rent for each of the involved years, which tended to show an insufficient amount of cash available to make the contributions claimed. Defendant admitted that he had previously been shown such statements of cash available. Relative to such statements he testified as follows:

Q. "What would you say about that?"

A. "Well, it simply indicates very definitely that these amounts were not contributed. They couldn't be."

Q. "In other words, you realize now that you couldn't have contributed the amounts you said you did?"

A. "That's correct."

Q. "In 1950, Mr. Zacher, your contributions, as I stated before, amounted to some $6,500. This, broken down weekly, is around $125.00 a week. When you were making up your return did you actually think that you gave that much money to various charities?"

A. "It never occurred to me to divide it up. If I had I would have readily seen that I couldn't have contributed that."

The defendant's answers as a whole seem clearly to show that his charitable deductions were based upon esti-

mates, that he had no receipts or records to support them, and that he was convinced that he had made overstatements. He denies, however, any willful intent to evade taxes.

Defendant insists that in any event the claimed admissions are admissions after the fact, and that the essential facts tending to be proved by such admissions must be corroborated. He relies upon **Smith v. United States**, 348 U. S. 147, and **Opper v. United States**, 348 U. S. 84. The Government concedes that the admissions are an essential part of the Government's case and that they must be corroborated, but contends that the record supplies the required corroboration. The requirements as to corroboration are thus stated in the **Opper** case (p. 93):

"* * * However, we think the better rule to be that the corroborative evidence need not be sufficient, independent of the statements, to establish the corpus delicti. It is necessary, therefore, to require the Government to introduce substantial independent evidence which would tend to establish the trustworthiness of the statement. Thus, the independent evidence serves a dual function. It tends to make the admission reliable, thus corroborating it while also establishing independently the other necessary elements of the offense. **Smith v. United States**, post, p. 147. It is sufficient if the corroboration supports the essential facts admitted sufficiently to justify a jury inference of their truth. Those facts plus the other evidence besides the admission must, of course, be sufficient to find guilt beyond a reasonable doubt."

In the **Smith case**, supra, the Court states (p. 156):

"There has been considerable debate concerning the quantum of corroboration necessary to substantiate the existence of the crime charged. It is agreed that the corroborative evidence does not have to prove the offense

beyond a reasonable doubt, or even by a preponderance, as long as there is substantial independent evidence that the offense has been committed, and the evidence as a whole proves beyond a reasonable doubt that defendant is guilty. * * * All elements of the offense must be established by independent evidence or corroborated admissions, but **one available mode of corroboration is for the independent evidence to bolster the confession itself and thereby prove the offense 'through' the statements of the accused.** * * *" (Emphasis supplied.)

We believe that defendant's admissions that contributions were overstated is amply corroborated. Many of the priests and officers of the alleged beneficiaries were called as witnesses. Few of the witnesses knew the defendant and his wife at the time the claimed contributions were supposed to have been made. The organizations still having their contributions records had no record of the contributions claimed by the defendant. A number of witnesses stated that contributions in the amounts claimed would be quite substantial and noticeable. Most of the priests had various types of collections where anonymous contributions were received, but in general such collections consisted of change and dollar bills, with only a very sparse amount of bills as large as $10 or $20, and the total receipts upon each occasion were in relatively modest amounts. A number of witnesses had never seen the defendant and his wife at their church services. Except for the $149.50 in cancelled checks, no substantial proof was offered to support defendant's contention that the contributions had been made. Defendant produced no records to substantiate the contributions. The compiled financial records of defendant and his wife showed that the defendant did not have money available in the form of currency to make the substantial contributions claimed. While it is true in many instances that the officers of the charitable organizations were not able to state categorically that no

contribution was received from the defendant or his wife, the record here furnishes strong support to corroborate the defendant's admission that the charitable contributions were not made in the substantial amounts he claimed.

There is direct proof exclusive of any admissions from which the jury could find that the defendant overstated casualty losses, and there is also proof that the sales tax deduction claimed exceeded the amount of sales tax paid. There are also a number of instances which tend to show that defendant overstated repair costs. For example, his return shows he paid Hill $37.36 for repairs, while his books and cancelled check show the amount of this repair to be $12.36. There are a number of similar discrepancies. The record amply supports a finding that the defendant's net income was substantially understated in the returns involved in this case because of overstatement of deductions.

The defendant has not admitted any willfulness or intent to evade the tax. Intent can seldom be proved by direct evidence. A consistent pattern of overstating deductions is shown. While many of defendant's bills were paid by check, scarcely any of the contributions were so paid. No records of the contributions were kept. Yet they are claimed in amounts of odd dollars and cents, repair invoices are padded and casualty losses are overstated. The evidence heretofore set out, when considered as a whole, fully supports a jury finding that the overstatement of deductions was willful and was done with an intent to evade the tax. **Spies v. United States**, 317 U. S. 492; **Holland v. United States**, 348 U. S. 121; **Canton v. United States**, 8 Cir., .. F. 2d ..., decided October 20, 1955.

2. The 1947 return involved in the first count was filed on December 30, 1947. Complaint was filed with the United States Commissioner on December 29, 1953, and the indictment was returned by the grand jury on January 7,

1954. Defendant moved to dismiss the indictment because it was barred by the six-year statute of limitations. 26 U. S. C., § 3748. He also objected to the fact that the indictment did not recite that the complaint had been filed. Proof of the filing of the complaint within the statutory period may be introduced although such fact is not set out in the indictment. **United States v. Clayton-Kennedy,** D. C. Md., 2 F. Supp. 233, 235. The complaint was filed within the limitations period. Under 26 U. S. C. § 3748 (a) (3), where complaint has been filed before the Commissioner within the limitations period, the time for filing indictment is extended until the discharge of the grand jury at its next session. The elapsed time between the complaint and indictment here was very short. The case was tried before the chief judge of the district. The court summons and discharges the grand jury. The court can take judicial notice of the sessions of the grand jury within the district. **White v. United States,** 5 Cir., 216 F. 2d 1, 4. There was no error in overruling the motion to dismiss the indictment.

3. Defendant also moved to dismiss the indictment on the ground that it was based on hearsay and opinion testimony of a Government investigator, and that there was no competent or legal evidence before the grand jury to establish the essential elements of the indictment. The defendant relies on **Nanfito v. United States,** 8 Cir., 20 F. 2d 376, and **Brady v. United States,** 8 Cir., 24 F. 2d 405, wherein it is stated that an indictment should be quashed if there is no competent evidence of the offense charged presented to the grand jury. In **United States v. Costello,** 221 F. 2d 668, 677, certiorari granted, October 10, 1955, the Second Circuit considers the rule stated in the **Brady** and **Nanfito** cases, and states that, if "incompetent" includes all evidence that may be excluded at the trial, it feels that the rule of the **Brady** case is too narrow. We are not here confronted with the necessity of determining just what is included in the term "incompetent evidence." We

feel the evidence here offered fully met the test of the **Brady** case. Even if it be true that agent Hanley was the only witness before the grand jury, the same witness appeared at the trial and offered substantial evidence which was admitted. Presumably he covered the same field before the grand jury. The situation here presented seems to be similar to that presented to this court in **Banks v. United States**, 204 F. 2d 666. There the defendant moved to dismiss the indictment because the grand jury spent only an hour in considering the case and heard only one Government witness, the testimony apparently consisting of some proof of the net worth method and the findings of Government investigators. This court at p. 670 states:

"* * * The evidence was admissible not only before the grand jury but also upon the trial * * *

"Further a trial court's exercise of discretion in denying a motion to quash or dismiss an indictment because of irregularity, if any, in grand jury proceedings is not ordinarily reviewable. * * *"

We are convinced that the court did not abuse its discretion in overruling the motion.

4. Defendant moved the court to suppress as evidence his books, papers and documents upon the ground that he was not advised of his constitutional rights at the time he turned over his records to the Government for examination. It appears that the examination started out as an ordinary tax audit. Defendant on all occasions voluntarily gave information and produced his papers. Even at the time of his examination under oath, after he was advised of his constitutional rights, he testified as follows:

Q. "You understand that you are not required to answer any questions which would be incriminating?"

A. "Yes. I felt free to answer these questions as you presented them to me before. I felt free then. I feel free now."

The record clearly shows that the furnishing of all information and records by the defendant to the agents was entirely voluntary. There is no evidence that the agents used any force or pressure at any time. In **Turner v. United States**, 4 Cir., 222 F. 2d 926, at 931, the court states:

"* * * The relevant inquiry is always whether the taxpayer freely gives his consent, and as to that there is no dispute in this instance.

"It has been expressly held time and again in tax evasion and other criminal cases that it is not essential to the admissibility of statements secured by officers of the law from a defendant that he should be first warned that the information might be used against him in a criminal case, provided that it was voluntarily and understandingly given. * * *"

See also **Blumberg v. United States**, 5 Cir., 222 F. 2d 496; **Hanson v. United States**, 8 Cir., 186 F. 2d 61. No constitutional rights of the defendant have been violated. The motion to suppress was properly overruled.

5. There is no fatal variance between the Government's proof and the amended bill of particulars. The amended bill was hereinabove set out. In the early part of paragraph 2 it is stated that certain specific items of deductions are disallowed. Later it is stated that the proof will further consist of a showing that certain deductions claimed on page 3 were not made. The record shows that the defendant was advised that the Government was relying on overstatement of repair deductions. The bill of particulars was broad enough to permit proof of overstatement of repair deductions.

6. Defendant's counsel wrote the United States Attorney advising that defendant had substantial sums of cash available as the result of gifts from his mother-in-law, Mrs. Wander, and asked that the case be reconsidered and

further investigated. Apparently, the United States Attorney sent this letter to the Attorney General with a recommendation that the case be dropped. Defendant by a subpoena duces tecum, not part of the record here, sought to have the letter to the Attorney General produced. The Government moved to quash the subpoena, and such motion was sustained. It seems clear that the letter to the Attorney General was a confidential and privileged communication, and accordingly the motion to suppress was properly sustained.

Defendant further contends that the aforementioned letter to the United States Attorney constituted a lead which the Government should have followed by investigation pursuant to **Holland v. United States**, supra. We do not consider this to be a net worth case. Specific overstatements of deductions are claimed and relied upon. Prior to the receipt of the letter, during the course of the extensive investigation made of the defendant's affairs, thorough inquiry as to gifts and inheritances was made, and the agents were advised that all such items were deposited in the bank account of defendant or his wife. As corroboration of the overstatements of contributions, the Government, through analysis of the bank accounts of the defendant and his wife, showed that there were insufficient cash withdrawals and undeposited rent items to provide the money for the large contributions claimed. We are also of the opinion that even if the rule of the **Holland** case as to leads should be held **inapplicable** here sufficient compliance has been shown. Mrs. Wander died in 1948, a number of years before the investigation commenced. It appears that she kept no record of her gifts. About the only source of information as to gifts was the defendant and his wife. They had previously been fully and completely interrogated as to gifts and inheritances. The testimony of the brother-in-law and sister-in-law as to gifts to the defendant or his wife is in the record for what it is worth. Such testimony

is indefinite and incomplete as to time and amount of gifts. The jury could give it such consideration as they thought it was entitled to. Further, since Mrs. Wander died in 1948, her gifts could not under this record be a possible source of cash for the contributions claimed in 1949 and 1950.

7. Defendant claims he understated his depreciation, and the court erred in rejecting testimony on this issue. The only offered testimony we find at the record reference in the defendant's brief is testimony as to when each of the properties was built based upon information acquired from the public records and as to the remaining useful life of the properties after 1947. There was no showing that the defendant owned the properties when they were built or that he acquired the properties in 1947. The objection to such testimony was properly sustained as the date of acquisition by the taxpayer is the proper starting point for depreciation. 26 U. S. C., §§ 23 (l) and (n), 113 (a) and (b), and 114, Internal Revenue Code of 1939.

Objection upon the ground that the issue was not involved in this case was made to allowing Hanley to testify as to the defendant's son's income. The exception claimed for the son was not in issue in the case, and when testimony had previously been offered as to the son's income, the court excluded the testimony upon objection and advised the jury to give no consideration to the subject. Upon cross examination of Government witness Hanley with reference to the son's income, defendant's counsel had asked, "It involved only a small amount of money, didn't it?" On redirect examination the witness was permitted to state the amount of the son's income. We do not believe the court abused its discretion in permitting this testimony upon the basis that the field had been opened by the defendant. Upon appeal, for the first time, an additional objection is raised that the method of proving the son's in-

come was improper. As this objection was not urged in the trial court it cannot now be considered.

Hanley was allowed to identify a transcript of Mrs. Zacher's bank records which he testified had been prepared by a fellow agent under Hanley's direction, control, and supervision. To sustain the admissibility of the transcript the Government relies upon the Federal Shop Book Rule, 28 U. S. C., §§ 1732 and 1733, as applied in **United States v. Mortimer**, 2 Cir., 118 F. 2d 266. The defendant relies upon **Palmer v. United States**, 318 U. S. 109, and **Hartzog v. United States**, 4 Cir., 217 F. 2d 706. In the **Palmer** case the court was not convinced that the investigation of accidents by railroad investigators was sufficiently in the regular course of business of the railroad to permit the introduction of statements obtained in the course of the investigation. The facts in the **Palmer** case are clearly distinguishable from the facts that we are now considering. The teaching of the **Palmer** case, however, is that the Federal Shop Book Rule should be applied with caution.

In the **Mortimer** case charts were offered to prove default in taxes upon a high proportion of mortgaged property. The charts were prepared by an accountant from information assembled under his supervision by several aides. The charts were admitted upon the verification of the accountant, the court stating in part (p. 270):

"On principle we cannot see why an accountant's aides whose job it is to take off material from the public records so that their chief may construct his tables and charts accurately are not acting in the regular course of business. * * * Likewise, accuracy is the life of an accountant's business, but the multitude of records cannot be checked by any one person alone. And here the system followed was not merely likely to insure accuracy, but apparently

did so, since the other side, far from discrediting the records, actually supported them. The trend in the courts is unmistakably to follow the methods of ordinary business in assuming the validity, until discredited, of records daily accepted in commercial routine. * * * "

In the **Hartzog** case the worksheets of a deceased agent in a tax case were not admitted. The basis for the rejection is stated by the court as follows:

"On the record presented to us, it does not appear that the worksheets prepared by Baynard were prepared under such circumstances as will provide a guarantee of trustworthiness. These worksheets were made in preparation for this prosecution; they were Baynard's personal working papers, were the product of his judgment and discretion and not a product of any efficient clerical system. * * *"

With reference to the **Mortimer** case the Court states:

" * * * The Second Circuit quite properly held that the testimony of a supervisory agent alone is sufficient where he has had complete supervision and direction of preparation of the evidence which he offers. * * * "

The court in the **Hartzog** case felt that the **Mortimer** case did not control because of differences in the factual situation in the two cases, principally that in the **Hartzog** case the agent was required to exercise discretion and judgment as to the classification of the information.

We feel that our present case comes close to the factual situation in the **Mortimer** case. Here the agent who prepared the transcript merely copied and listed the various items of receipts and disbursements. He listed all such items shown by Mrs. Zacher's records. No classification of the various items as to whether they were capital or income was involved. His duty was merely to copy all items as they appeared on the record. Hanley himself checked

the defendant's account. Defendant and his wife issued many checks to each other so that this afforded a cross check on the records prepared by Hanley and the other agent. Further, it appears that Mrs. Zacher's bank records were still readily available to the defendant and could easily have been produced if desired to demonstrate any error that might have been made in listing such items. Under the record here made we find no abuse of discretion in receiving the transcript of Mrs. Zacher's bank account upon Hanley's verification.

The defendant likewise objects to the hypothetical question propounded to agent Wallace pertaining to the income tax due under circumstances disclosed by the hypothetical question. We believe that there was evidence tending to prove the facts assumed in the question, and that it included the material facts which the evidence tended to prove and which had a bearing upon the subject concerning which the expert was asked to testify. The defendant has not demonstrated any error here. We are satisfied that the trial court committed no error in overruling the objection. See **Guzik v. United States**, 7 Cir., 54 F. 2d 618.

8. Lastly, defendant urges that the court committed error in refusing to give some of his requested instructions, particularly in that the instructions given did not sufficiently elaborate upon the net worth theory. The defendant concedes that the instructions of the court were correct as far as they went. We have heretofore held that this is not a net worth case. We have examined the requested instructions and also the instructions given, and are satisfied that the court by its instructions fairly submitted the case to the jury.

We have fully considered the errors urged by the defendant. We find no prejudicial error such as would warrant

a reversal. We believe that the defendant has had a fair trial.

The judgment is affirmed.

A true copy.

Attest:

(Seal)

E. E. Koch,
Clerk, U. S. Court of Appeals,
Eighth Circuit.

(Judgment.)

United States Court of Appeals
for the
Eighth Circuit.

No. 15310—September Term, 1955.

Friday, November 4, 1955.

Clarence A. Zacher,
Appellant,
vs.
United States of America.

Appeal From the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Clarence A. Zacher, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 4, 1955.

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